THE NEW-YORK
CITY-HALL RECORDER.

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AT a COURT of GENERAL SESSIONS of the Peace, holden in and for the City and County of New-York, at the City-Hall of the said City, on *Monday*, the 7th day of *June*, in the year of our Lord one thousand eight hundred and nineteen—

PRESENT,

The Honourable
CADWALLADER D. COLDEN,
Mayor.

P. A. JAY, *Recorder.*
E. W. KING, *Alderman*, and
JAMES WARNER, *Special Justice.*
P. C. VAN WYCK, *Dist. Att.*
JOHN W. WYMAN, *Clerk.*

(CHALLENGE—CONFESSION.)

JOHN W. THORN, VALENTINE N. LIVINGSTON, AND HENRY D. TRACY'S CASE.

VAN BEUREN, *Attorney General*, S. JONES, jun. ANTHON, MAXWELL and HAMILTON, *Counsel for the prosecution.*

EMMET, HOFFMAN, OGDEN, WELLS, WILKINS, PRICE, and FAY, *Counsel for the defendants.*

A challenge may be interposed against a juror, though the party taking the challenge, in the first instance, puts a question to the juror touching that which forms the ground of the challenge.

The *two* jurors first called and sworn, are to be the triors to decide on the competency of a juror challenged.

Where a challenge to the favour is taken, the specific cause need not be assigned previous to the trial of such challenge.

A juror in a criminal case should stand wholly indifferent between the prosecution and the accused, and *free from all exception*; and if, on the trial of a challenge, circumstances appear sufficient to produce a doubt in the minds of the triors, whether such juror stands indifferent or not, it is their duty to reject him.

Three were indicted for conspiring to obtain by unlawful and indirect means, a large sum of money from a bank. One of them, who had charge of the money when obtained, (as was alleged in the indictment,) was arrested on a capias, in a suit brought by the bank for the recovery of the money, at the house of one of the officers of the bank. At this house the defendant, by his own choice, remained several days; and in the mean time such officer, assuring him that the object of the bank was to convict the other two, promised him that if he would make a frank and full disclosure of all the circumstances implicating them, that he should be made a state's evidence against them. Under the influence of this promise, as the officer believed, a confession was made, which was reduced to writing by a third person. Though it appeared that immediately previous to the time of the confession no promise was made to the defendant, and, that immediately afterwards, he declared it was made freely and voluntarily, and from a sense of duty, it was held, that such confession could not be received in evidence.

It is immaterial, whether the person making a promise of favour which influences a confession, be concerned in the administration of public justice or not: and it is equally immaterial whether such confession was made with reference to, or in the progress of, a criminal prosecution.

The defendants were indicted for a conspiracy. The indictment, in the first count, charged the defendants with conspiring together, on the 1st of March, 1819, to obtain, by unlawful and fraudulent means, out of the proper funds of the President, Directors and Company of the Merchants' Bank in the City of New-York, a large sum of money, to wit, the sum of $100,000, the property of the said President, Directors and Company, for the purpose of applying the same to their (the defendants') own use, without the privity, knowledge, or consent of the said President, Directors and Company, to their great damage, and against the peace, &c. The second count charged the defendants with conspiring to embezzle, and unlawfully take and convert to their own use, a large sum of money, to wit, $100,000, and a large amount of notes commonly called promissory notes, that is to say, of the value and amount of $100,000, from and out of the funds and moneys of the said President, &c. to their damage, and against the peace, &c. The third count charged the defendants with

conspiring together, unlawfully and wickedly, to take and convert to their own use, the property, choses in action, notes for the payment of money, commonly called promissory notes, and the moneys of the President, Directors and Company of the Merchants' Bank to a large amount, to wit, $100,000, in abuse of the trust and confidence reposed in the said John W. Thorn, first teller of the said bank, to the great damage, and against the peace, &c. And the fourth count charged, that the defendants, being evil disposed persons, and contriving to injure and impoverish the said President, &c. and to deprive them of their honest and fair gains, to be derived from the use of their promissory notes for the payment of money, commonly called bank notes, on the 1st of January, 1819, conspired, combined, and confederated together, to obtain by fraud and dishonest means, the use of a large sum of money out of the funds of the said President, &c. to wit, $30,000, without paying any interest or discount, or equivalent therefore, for the use thereof, to the said President, &c. and also to obtain, by fraudulent and indirect means, the use of a large amount of promissory notes, to wit, $30,000, being the property and a part of the funds of the said President, &c. for a large space of time, to wit, three months, without paying any interest or equivalent therefore. And that the said defendants did then and there so obtain, in pursuance of their unlawful conspiracy and agreement, out of the proper funds of the said President, &c. a large sum of money, to wit, $30,000, and a large amount of promissory notes for the payment of money, to wit, $30,000. without the knowledge, privity or consent of the said President, &c. then and there kept and converted to their own use and benefit the last aforesaid sum, and the said notes, without paying any interest or discount, or equivalent therefore to the said President, &c. to their great damage, and against the peace, &c.

The cause was brought to trial on Thursday, the 17th instant.

Richard Allen, having been called as a juror, was asked by Maxwell, whether he, Allen, was not related to Thorn, one of the defendants. The juror having answered in the negative, the counsel interposed a challenge on the ground of relationship.

Hoffman objected to this course, on the ground that the counsel had first made the inquiry of the juror; but the court decided that the challenge might be tried.

The counsel for the prosecution having interposed a challenge to the favour generally, a question arose, whether the *three* or *two* first jurors, called and approved, should be the triors. Reference was had to the case of Diana Sellick, tried in the Oyer and Terminer in this city for murder, before Judge Van Ness; (1 City-Hall Recorder, p. 185;) and it was found that the two jurors first called were sworn as triors.

The usual oath having been administered to the two triors, Richard Varick, the President of the Merchants' Bank, on being sworn as a witness on behalf of the prosecution, testified, that some time in the spring of 1818, the bank was overdrawn by the firm of R. & D. K. Allen, Thorn, one of the defendants, then being the first teller; and that Richard Allen was one of the firm of R. & D. K. Allen. When this affair occurred, the witness called on Thorn for an explanation, and he said that Richard Allen was a relation, a townsman, and a schoolmate.

William W. Thorn, on being sworn on the part of the defendants, testified, that he was a brother to one of them, and that Richard Allen is not related to the witness in any manner whatsoever.

Van Beuren hereupon offered to show other facts to support the challenge.

Emmet objected, and contended that, having in the first instance assigned relationship for cause, the prosecution should be confined to that ground. Had the counsel for the defendants insisted, the opposite counsel, in strictness, would have been obliged to assign the cause of challenge in writing, that the defendants might have had an opportunity to join issue or demur. The prosecution ought not to be indulged in this fishing voyage; but should be confined to the ground first taken.

Van Beuren, in reply, admitted that relationship had been at first assigned as the cause of challenge, but that after-

wards a challenge was taken to the favour generally; and that in this species of challenge it was not necessary to specify the cause. The challenge is a general one, and the cause need not be assigned, except as it may arise in the testimony.

After further argument, the mayor said, that the question was, whether in a challenge to the favour it was necessary for the party, interposing the challenge, to specify the cause previous to the trial. The court think this is not the case. We believe this from the general words contained in the authorities which speak of a challenge to the favour; and this opinion is strengthened by the consideration, that the oath administered to the triors, renders it incumbent on them to try, whether the party challenged stands indifferent between the prosecution and the party accused. If the person challenged be an intimate friend of the party, this constitutes a sufficient ground of a challenge to the favour; and we do not think that a logical precision in assigning cause in this species of challenge would, in general, be practicable; and, in the opinion of the court, it is unnecessary.

Isaac Burr, being sworn, testified, that he had known the families of Thorn and Allen twenty or thirty years, and no relationship subsisted between them; but they were townsmen.

Henry I. Wyckoff, being sworn, testified, that on the 4th or 5th of March last, he, with two other directors of the bank, constituted the committee to inquire into the state of its funds, when the discovery took place upon which the present prosecution is predicated. A check, on the Branch Bank, was found among the papers of Thorn, one of the defendants, as the witness was informed by the second receiving teller, bearing date the day previous to the examination. Thorn, on an inquiry by the committee, admitted that he had advanced the money of the bank for it; alleging in excuse that he received it of a friend; and on a further inquiry, but with some reluctance, he said, that he had advanced the money either to D. K. Allen, or R. & D. K. Allen; and which of them it was the witness did not remember.

This witness further testified, that at the time the bank was overdrawn, as stated by Richard Varick, in his testimony, Thorn, on being called, said that R. & D. K. Allen were particular friends and townsmen.

John B. Thorp, on being sworn, testified, that the firm of R. & D. K. Allen was dissolved in the fall of 1817. Before this time, the property of the firm was assigned for the benefit of their creditors, and D. K. Allen took the benefit of the act. At the time the bank was overdrawn Richard Allen was in Virginia.

Emmet contended to the triors that no sufficient cause of challenge had been produced. The ground of relationship had been abandoned; and the prosecution, in the last resort, had recurred to a supposed intimacy between the families of Thorn and Allen. In this, he insisted, that the prosecution had failed. Should the triors decide in favour of the challenge, the effect would be to deprive the co-defendants with Thorn of an important privilege.

The counsel further urged, that it was incumbent on the prosecution to show clearly that the juror was not free from just exception; and that should the triors entertain a doubt whether he was indifferent or not, it would be their duty to decide against the challenge.

Jones, contra.

The mayor charged the triors that the question for them to decide was, whether Richard Allen stood indifferent between the prosecution and the accused.

He was accused of no crime; and, in the opinion of the court, the triors ought to be governed by a principle different from that which prevails where a jury are to decide on a question of innocence or guilt. *There*, whenever the jury entertain a rational doubt, they are bound to acquit; *here*, should the triors, from all the circumstances produced, believe that the challenged is not wholly indifferent and free from all exception, or, should they entertain a doubt on the subject, in either case, it would be their duty to decide in favour of the challenge.

In the species of challenge now under consideration, not relationship alone forms a sufficient cause of challenge: but if the party on trial is an intimate ac-

quaintance of the juror called and challenged, he is incompetent.

If, in this instance, relationship is proved to the satisfaction of the triors, there could be no doubt of their verdict. On this head we have the positive declaration of Thorn, testified to by Richard Varick. Generally, a confession is the highest evidence; but even a confession may be rebutted or explained by other testimony. For this purpose, William W. Thorn, a brother of one of the defendants, has been produced, who swears that Richard Allen is not a relation; and in this he is corroborated by Isaac Burr.

If, from the facts, the triors should believe that Richard Allen is a relation to Thorn, one of the defendants, then, it will be their duty to decide in favour of the challenge.

But in this case relationship is not the only cause of challenge; and should the triors believe that there is, and has been, a peculiar intimacy subsisting between Thorn and the party challenged, this is equally a sufficient cause for his rejection as a juror.

The evidence on this point is derived principally from Varick and Wyckoff, and is, in some measure, corroborated by that of Isaac Burr, a witness called on the part of the defendants. He has known the families of Thorn and Allen for twenty or thirty years, and they were townsmen.

On this occasion, the counsel for the prosecution, in his remarks to the triors, had recurred to the general charge contained in the indictment against the defendants, and that with propriety; and, in reference to that charge, particular acts of friendship and intimacy have been produced, which the court think worthy of consideration. It will be for the triors to say, whether a person standing in the relative situation that Richard Allen does to Thorn, can be indifferent between him and the prosecution.

But there is a stronger circumstance relied on by the prosecution. It seems that in March last, the bank instituted an inquiry into its concerns; and a check on the Branch Bank was found among the papers of Thorn, then the first teller, who admitted that he had advanced the money of the bank for the check to a friend; and on a further inquiry, said, with some reluctance, that he received the check either from the firm of R. & D. K. Allen, or D. K. Allen. For the purposes of this investigation, in the view of the court, it is immaterial whether the money was advanced to the firm or one of the partners; for they were brothers.

The triors, without leaving their seats, rendered a verdict in favour of the challenge, and Richard Allen was rejected as a juror.

Hamilton opened the case on the part of the prosecution, by stating the nature of a conspiracy, the details of the business of a bank, the duties of its officers; and the counsel then proceeded to state the circumstances which led to the discovery in March last, mentioned in the testimony of Varick and Wyckoff, and the means used by the defendants to deprive the bank of the money, as charged in the indictment. But as the confession hereafter mentioned, upon which the whole weight of the prosecution rested, was rejected by the court, as will appear in the sequel, and as every man is presumed to be innocent until *proved guilty*, we conceive the legitimate object of a report of this case should be, to present with clearness, only those facts necessary to illustrate the points of law decided by the court, and to suppress all facts not having relation to those points. To every reflecting mind the propriety of the course we have adopted must be obvious. The prosecution was abandoned; and it is to be presumed, that the accused were thereby precluded from introducing any testimony to rebut the circumstances of suspicion, if such there were, produced against them.

It appeared, from the subsequent testimony on behalf of the prosecution, that previous to the month of March last, the Merchants' Bank had been frequently overdrawn to a considerable amount, and a variety of circumstances having occurred, affording, as was believed, just grounds of suspicion of the unfaithfulness of the servants of that institution having charge of the funds, a committee of three of the directors was appointed to investigate the affairs of the bank, and met for that purpose, on the 6th of that month.

The result of the examination was that there was a deficiency in the account of

Thorn, one of the defendants, then the first teller, to the amount of $100,000. In this officer, from the nature of his situation, an almost unbounded confidence was necessarily placed: and he had frequently the control of $1,000,000. He was soon afterwards arrested on civil process, at the house of Richard Varick, the president of the bank, in a suit brought for the recovery of the money. The bank, at the time of the arrest, was desirous that it should be kept secret until an opportunity might be afforded for arresting the two other defendants; and Thorn, after the arrest, through his own choice, as he alleged, remained with the deputy sheriff, Kip, several days at the house of Varick, who, in the mean time, believing that Thorn and the other two defendants had subjected themselves to a criminal prosecution, under the statute relating to embezzlement, assured him that the object was to convict the other two; and that if he would come forward with a frank and full disclosure of all the circumstances implicating them, he should be made a state's evidence. Thorn, in the first instance, strenuously objected, and absolutely refused to make this disclosure, which he alleged would be highly dishonourable. He wished to make a partial statement, but finally consented to make one in full.

Richard Varick, in the course of his testimony, stated, that he believed that *the confession of Thorn was made under the influence of the promise of making him a state's evidence.*

The confession was reduced to writing on the 13th of March last, by Peter Jay Munro, Esq. who, at this time, knew nothing of the promise which had previously been made by Varick to Thorn. Munro, at this time, made Thorn no promise; but having before understood, that he wished to make a confession, Munro merely told him that if he wished to do so, he, Munro, would write it: and he further observed to Thorn. that, if he made a confession, he had better make it in full. At the time of the confession he was under arrest.

After the confession was reduced to writing, Thorn said that he had staid at Col. Varick's house voluntarily, and was much obliged to him; and, with regard to the confession, declared that he had made it freely and voluntarily, and from a sense of duty.

The counsel for the prosecution hereupon called upon Munro to produce the confession, that it might be read in evidence.

The counsel for the defendants objected to the introduction of this confession in evidence.

Wells and Emmet contended, that at the time this confession was made, Thorn was, and had been for nearly a week before, a prisoner in the house of Col. Varick. The confession was extorted under a promise made by him to Thorn that he should be made a state's evidence against the others; and it is candidly admitted by Col. Varick, that he believes the promise influenced the confession. It therefore cannot be received.

The counsel, in support of their argument, cited to the court 1 Chitty's Crim. Law, p. 85, and Phillips' Ev. p. 80, to show, that "no improper influence, either by threat, promise, or misrepresentation ought to be employed; for, however slight the inducement may have been, a confession so obtained cannot be received in evidence, on account of the uncertainty and doubt, whether it was not made rather from a motive of fear or interest, than from a sense of guilt." The counsel also referred to the eighth and ninth rules, under the head of Examination, in M'Nally's Ev. p. 42 and 43, for the purpose of showing, "that before such examinations can be read in evidence, it must also be testified that they were made freely, without any menace or terror, or any species of undue influence imposed upon the prisoner." 1 Hale's P. C. 284.

Hale gives the reason: "I have often known," says that venerable and benevolent judge, "the prisoner disown his confession upon his examination before the justice, and be sometimes acquitted against such confession."

"These rules reflect the brightest lustre on the principles of the English law, which benignly considers, that the human mind, under the pressure of calamity, is easily seduced, and liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail: and therefore a con-

fession, whether made upon official examination, or in discourse with private persons, which is obtained from a defendant by the impression of hope or fear, however slight the emotion may be implanted, is not admissible evidence. For the law will not suffer a prisoner to be made the deluded instrument of his own conviction." Gilb. Ev. by Loft. 137.

Anthon and Maxwell contended, that as the amount of Col. Varick's testimony was, that he promised Thorn, that if he made the confession he should be made a state's evidence, and that under the influence of that promise he made the confession, if the doctrine of the defendants' counsel be correct, then the statement of an approver could in no instance be received: for in most cases, such a witness testifies under the strongest influence of a promise of favour.

They also urged to the court, that all the authorities in the books, relating to confessions, apply to a case where a prisoner is taken on a criminal charge, and a confession is made by him before a magistrate in the ordinary administration of criminal justice. But where, as in this case, the defendant was under arrest on *civil process*, and the promise which induced the confession was made by a *private individual*, not concerned in the administration of justice, there was no good reason why such confession should not be received.

The counsel also insisted that the confession ought not to be arrested by the court, but should be suffered to go to the jury.

The counsel, in support of their argument, cited M'Nally's Ev. p. 47, rule eleventh.

Emmet, in reply, argued, that the books made no distinction between a confession by a prisoner while under arrest on a criminal charge or otherwise: nor was it material whether the promise which induced the confession be made by, or in presence of, a magistrate or not: it is sufficient, if the promise made, did influence the confession; for if so, it must be excluded. The reason of the rule was, that a man, whose *mind had been previously wrought on*, so that its free exercise was restrained at the time of a confession, was, in that situation, as likely to make a false as a true statement. A confession is of no validity whatsoever where *the mind* is not entirely free in its operations. The inquiry, in such cases, relates to the state of *his mind*, and not to the *process* by which he was detained, or the *person* who may have made the threats or promises.

In this instance, Thorn was taken a prisoner, and was under arrest nearly a week. His *mind* was operated upon and broken down, and he was restrained by a bond stronger than iron. At one time he was made to believe that his case came within the statute relating to embezzlement, and at another, he was soothed and cajoled with professions of friendship. His mind was not free at the time of this confession, and it therefore cannot be received.

The mayor, in the decision of this question, said, that in the opinion of the court, it made no difference whether a party, making a confession, was under arrest on criminal process or not; or whether such confession was made before a private person or one concerned in the administration of justice. If a promise of favour, made by or before any person, influences a confession, it is well settled, that it cannot be received in evidence. And as from the testimony of Col. Varick it appears, that he believed that Thorn made this confession in consequence of the promise made to him, that he should be made a state's evidence, it is the unanimous opinion of the court that the confession cannot be read.

After the counsel on behalf of the prosecution had consulted together, Van Beuren, addressing the court, said, that the prosecution had been taken by surprise, not having anticipated that this confession would be assailed on the ground taken by the opposite counsel. Though it was still in the power of the prosecution to produce many strong circumstances, yet, as this confession had been unexpectedly rejected, they did not expect to be able to make out such a case against these young men as the counsel could conscientiously press to the jury.

The prosecution having been abandoned, the Mayor instructed the jury,

that as there was no evidence before them, against the defendants, the jury should acquit them.

The jury immediately pronounced the defendants not guilty.

(NUISANCE.)

ROGER PROUT'S CASE.

VAN WYCK, *Counsel for the prosecution.*
PRICE, *Counsel for the defendant.*

To constitute a public nuisance by conducting, in a populous city, a lawful business, it is not sufficient that its exercise be merely *disagreeable:* but it must be an annoyance, calculated to interrupt the public in the *reasonable* enjoyment of life or property.

The defendant was indicted for a public nuisance, in keeping and maintaining a certain ink manufactory, the furnaces in which emitted noisome and unhealthy smells and vapours, to the common nuisance, and against the peace, &c.

It appeared in evidence that the manufactory, mentioned in the indictment, is situated in the rear of one of the lots on the east side of Spring-street, between Crosby and Orange streets, and near Broadway. The defendant commenced the business of manufacturing printing ink in this place about seven years ago, when there were but few buildings in that part of the city; but since that time, many houses, adjacent to the manufactory, have been erected.

James Gritman, on being sworn on behalf of the prosecution, testified, that the building is in the same block where he dwells; and that whenever, for the purposes of the manufactory, oil is boiled, which is about once a week, the smell is disagreeable, especially when his windows are raised.

On his cross-examination, he stated, that he had never been in the manufactory: that there was one for chocolate, and there had been a distillery in this quarter; and that he never had any difference with the defendant.

Reuben Cannet, sworn on the same side, stated, that the boiling was offensive; he was often obliged to shut his windows, and that the smell was more disagreeable in summer than at any other time.

Cross-examined: I have lived about three years about one hundred feet from the premises.

David Sherwood, sworn; I live at the corner of Spring and Crosby-streets, about one hundred and thirty feet from the manufactory, and when they are boiling there is a smell similar to that arising from the boiling of nauseous oil.

Sarah Sherwood, sworn: The smell from the manufactory is very disagreeable. I never smelt it but three times. I was unwell: it seemed to stop my breath. I lived near the place a year, but don't live there now.

Mary Hicks, sworn: I live near. The smell annoys me so much that I have been obliged to shut up my house and go off. It makes me sick.

Rachel Climp, sworn: I lived about one hundred yards from the place. The smell annoys me very much. Before we went there to live I visited a neighbour near the manufactory, and the smell made me sick.

Gertrude Bennet, sworn: I lived near the manufactory, but would not live there again. I was much annoyed by the smell.

The prosecution here rested.

Price, in opening the case, stated to the jury that he had himself been on the premises, and the manufactory was conducted with the utmost cleanliness.

It would appear, in testimony, that in the process of manufacturing ink, linseed oil, and that of the purest kind, was used, and that nothing offensive resulted from the boiling, which occurred, upon an average, but once a month.

It would also appear, that the defendant, an industrious, meritorious citizen, about seven years ago, and when but few buildings were erected in that quarter, at considerable expense, had built this manufactory: he had invented a process for making printing ink of a better quality, and at a less expense, than any other manufacturer in this country.

The jury would recollect, that a populous city is, necessarily, a congregation of

disagreeable smells: if we reside here, the many benefits and comforts we have, must have a portion of alloy.

A judgment in this case affects the living of the defendant: if he is convicted, his establishment must be abated—his property become useless, and his prospects blasted.

Dr. William J. M'Niven, on being sworn on behalf of the defendant, testified, that about a fortnight ago, the witness visited the premises used by the defendant as an ink manufactory, and found it very clean. There is a flower garden adjoining, between the manufactory and Spring-street. Having called on the witness as a professional man, the defendant showed him the premises. The chimneys are so constructed that they all carry the smoke high. The smell of the oil in boiling was not unpleasant to the witness; nor is it, in his opinion, after a close examination, unhealthy. It is of the best quality of linseed oil, (here a phial of the oil was exhibited to the jury,) like this.

Dr. John W. Francis, Professor of Medical Jurisprudence, on being sworn, testified, that being called on by the defendant, he, the witness, visited the manufactory, while the oil was boiling. There is nothing unhealthy in a single operation. I know, said the witness, no manufactory, in its operations more conducive to health. Indeed, from the latest reports, it appears that it has been discovered that the fumigations, arising from tar, in burning, are highly salutary, and have afforded relief in consumptions: and if so, I should think the fumigations arising from this manufactory, while in operation, are much more so. Resin is used in the manufactory, and the materials must be of the best kind.

Hannah Jenkins, sworn: I live opposite the manufactory, and have done so for nearly three years, and I have neither smelt nor discovered any thing disagreeable.

Anthony Davy, sworn: I lived one of the nearest to the manufactory. The smell was not disagreeable.

Grace Davy, sworn: Concurred with her husband.

George Boyd, sworn: I live but a short distance, but never smelt any thing from the manufactory.

John Hipper, sworn: I live in the same block and never smelt any thing disagreeable, except they were boiling.

Abram Carman, sworn: I lived two years adjoining the manufactory, and do not consider it unhealthy, though, while they are boiling in warm weather, it is something disagreeable.

Tobias Galloway, sworn: Concurred with the last witness.

J. D. Cashbone, sworn: I lived near there four years, and kept a fruit shop. I did not consider the manufactory a nuisance, though when I first came there the smell was something disagreeable.

Elijah Washborn, sworn: I lived near the manufactory five years, and was not annoyed; though my family sometimes complained of the smell.

William M'Kee, sworn: Before the manufactory was established I lived near the place. The smell from the boiling is not injurious to health.

Jacob Gosling, sworn: I lived four years near the manufactory, and did not find it disagreeable.

Isaac Doughty, sworn: For three years I have lived within seventy or eighty feet of the manufactory. I have sometimes been offended with the smell, but the place is as clean as it could be kept.

John Sembler, sworn: I am a barber, and live next door but one of this place; but I lost no custom by reason of the smell.

Adolph Brower, sworn: I am acquainted with the process of making printing ink. There is nothing unhealthy in the manufactory, and, for my own part, the smell is agreeable to me.

Jonathan Pinckney, sworn: I am the City Intendant—have been to the manufactory three times; and on last Saturday I went there and found, as before, as much cleanliness as was compatible with the nature of the business. The defendant has invested several thousand dollars in the establishment.

David Marsh, sworn: There is no nuisance there, that I ever saw.

Isaac Collins affirmed: I have been at the manufactory several times, and never

observed but that it was conducted with cleanliness. I am well acquainted with the manufacturing of printing ink. There is nothing offensive or unhealthy in the process. The defendant is a very skilful man in this business, and has brought the manufacturing of printing ink to great perfection, and has improved the process.

Cornelius S. Van Winkle, sworn: I am a printer—have been at the manufactory, and there is nothing offensive in heating the oil. The ink manufactured by the defendant is the best in the United States; and such is the improvement that he has made in his business that about twenty-five per cent. in the price is saved.

Daniel Fanshaw, a printer, on being sworn, concurred with the last-named witness.

John Smith, sworn: I live within twelve or thirteen feet of the premises. I do not consider the manufactory a nuisance. One day, while boiling oil, the defendant dipped in the kettle a piece of bread and toasted it. I eat it, and found the taste not disagreeable.

Russel Smith, sworn, concurred in every particular with the last-named witness.

Here the defendant rested.

Sarah Caniff, sworn on behalf of the prosecution: I have lived in the rear of the manufactory nearly three years. The smell is disagreeable; but within three weeks it has been better.

Jacob Climp, sworn: I have lived some time past within three feet of the manufactory, and once it made me sick.

John Hicks, sworn: The smell is as bad as —— eggs; and the clothes in our yards are blacked by the lampblack.

Cross-examined: I live nearer to the manufactory than I want to: it has injured my feelings.

Peter Vallo and Phebe Brown, being severally sworn on behalf of the prosecution, concurred in stating generally, that the smell from the manufactory was disagreeable.

Eleanor Osborn, sworn on the same side: I lived near the manufactory, where we own three houses. I did not think it prejudicial to my health or comfort. I never heard our tenants complain.

William Sherwood, sworn: The smell is disagreeable.

Adam Blackledge, sworn: In warm weather I conceive the smell offensive.

Cross-examined: I have brought these witnesses for the prosecution.

Margaret Doughty, sworn: I live adjoining the manufactory, and at times the smell is disagreeable.

Jacob B. Taylor, an alderman, on being called from the bench, and sworn on behalf of the defendant, testified, that he had passed by the manufactory several times, and neither saw nor smelt any thing offensive; and that, on being called there by the defendant, the manufactory appeared as cleanly as the nature of the business would admit.

Thomas Cochrane, a watchman, on being sworn, testified, that he had been at the manufactory while they were boiling, and he could perceive no bad smell.

Moses Prout, sworn: I am the son of the defendant, and have attended to the business five or six years, and never suffered, in the least, in my health. It takes us from four to six hours to boil; and in the course of our business we do not boil more than once a month upon an average.

The raw materials which we use in the process are, linseed oil, of the best kind, and resin. We could not use animal oil, of any kind, in the manufacturing of printing ink. We use always the same kind of oil, and it is equally as good as this. (Exhibiting the phial.)

The process is first to boil down the oil sufficiently in a large kettle, then put in the resin in due proportion, and afterwards the lampblack.

Here the evidence on both sides closed.

Price summed up the case, and in his remarks to the jury contended, that if the weight of testimony was to be regarded, that on behalf of the prosecution was greatly overbalanced by that on the part of the defendant. He had produced twenty-six, while the prosecution had but sixteen.

The counsel further urged to the jury, that to constitute a public nuisance in conducting a lawful business, it was not sufficient for the prosecution to show that the annoyance was disagreeable merely: it

must appear, that it was unreasonably so. It is not sufficient for him to show that a few individuals are incommoded; it must appear that it is a *common and public nuisance.*

The counsel, in support of his argument, read to the jury a case from 1 Peake's Rep. p. 91, Rex vs. Neville.

The defendant having been indicted for a nuisance in carrying on the business of a melter of kitchen stuff and other grease, and it appearing that there had been manufactories which emitted disagreeable and noxious smells carried on in this neighbourhood for many years; and that the defendant came into the neighbourhood about four years ago, Lord Kenyon instructed the jury, "that a man setting up a noxious business in a neighbourhood where such business has long been carried on, is not indictable for a nuisance, unless such noxious vapour is much increased by his manufacture."

The counsel also read the case of The King vs. Lloyd, 4 Esp. Rep. p. 200.

This was an indictment for a nuisance against a tinman, prosecuted by the Society of *Clifford's Inn.*

The prosecutors, attorneys, proved, "that in carrying on such part of their business as required particular attention, in perusing abstracts, and other necessary parts of their profession, the noise was so considerable, that they were prevented from attending to it."

Lord Ellenborough said, "that upon this evidence the indictment could not be sustained; and that it was, if any thing, a private nuisance. It was confined to the inhabitants of three numbers of Clifford's Inn only; it did not even extend to the rest of the society, and could be avoided by shutting the windows: it was therefore not of sufficient general extent to support this indictment. The defendant was acquitted."

Van Wyck, contra.

The mayor charged the jury, that the defendant was not brought as a criminal before them; he was a respectable, meritorious citizen, conducting a lawful business, and the question before them was, whether, in this case, he has a right so to do.

It had been truly remarked by his counsel, that after a conviction, in cases of this description, it is the constant practice of the court to suspend the sentence a reasonable time, to give the defendant an opportunity to remove the nuisance. If this is done, a nominal fine is imposed; but if not, a severe punishment follows: so that a verdict of conviction in this case would be tantamount to an utter destruction of the defendant's business, at the place where it is conducted.

To determine this question it would be necessary to understand the nature of the offence charged in this indictment. A public nuisance may be denominated, any thing which interrupts the public in the reasonable enjoyment of life or property. To constitute a nuisance, it is not essential that the matter complained of should be prejudicial to health: it is sufficient if it deprives the citizen, unreasonably, of the comforts or conveniences of life.

According to the weight of the testimony, in this case, we do not find that this manufactory, in its operations, is deleterious, or destructive to health; and the only question for the determination of the jury is, whether the business, carried on by the defendant in his manufactory, interrupts the public in the reasonable enjoyment of life or property.

Having thus explained the nature of the offence charged in the indictment, and called the attention of the jury to the question to be determined, the court consider their duty discharged. It is the province of the jury exclusively, to judge in matters of fact.

It will be observed, that on this occasion forty-six witnesses, on both sides, have been produced; but we find several of them, in their testimony, supporting the side opposite to that on which they were called. Such, in particular, was the testimony of Mrs. Osborn.

The court again repeat, that to constitute this offence it is not sufficient that the operations of this manufactory be disagreeable merely: they must be *unreasonably disagreeable.*

There is one important feature in this case, which, in the view of the court, goes far in favour of this defendant: he makes use of pure linseed oil and resin in his manufactory, by boiling them together; and the professional gentlemen who have been examined concur in stat-

ing that nothing disagreeable arises from this process; and, one of these witnesses represents, that, so far from being deleterious, the fumigations are conducive to health.

It will rest with the jury to say, whether the evidence will warrant the conclusion, that this manufactory is a common and public nuisance; and whether, under all the facts and circumstances of the case, they ought, by their verdict, to compel its removal, and thus sacrifice the defendant's property.

The jury, without leaving their seats, acquitted him.

(GRAND LARCENY—EVIDENCE.)

JOHN ATWOOD'S CASE, *ind. with* ANTHONY WILSON.

VAN WYCK, *Counsel for the prosecution.*
RODMAN, *Counsel for the prisoner.*

Where stolen property is returned to the owner, by a person who, at the time, gives an account of his possession, it was held, that such account might be received in evidence as part of the *res gestæ*.

In a case, wholly depending on circumstances, they must be such as are consistent with guilt only.

The prisoner, a black, was indicted for grand larceny in stealing two gold watches, of the value of $400, the property of Samuel Packwood, on the 13th May last.

It appeared in evidence, that in the night the prosecutor's house was broken open, and the watches stolen. He printed handbills, stating his loss, and offering a reward of $70. In two days afterwards, the prisoner came, with one Molineaux, a coloured man, having the two watches.

At this point of the testimony, the principal witness was about stating what the prisoner said when he returned the property. Van Wyck told the witness that he need not relate what the prisoner said.

Rodman insisted, that the declarations of the prisoner *made at the time*, ought to be received as part of the *res gestæ*.

Van Wyck, contra, insisted, that the declarations of a prisoner, in his own favour, are not admissible, because almost every person detected in theft, is capable of inventing some plausible story.

The mayor said, that, generally speaking, the declarations of a prisoner in his own favour, are not to be received. But here the counsel for the prosecution, for the purpose of charging the prisoner, gives in evidence *the bare act of possession*, which, in itself, under the peculiar circumstances of the case, affords no evidence of criminality. We think, that his relation, *at the time*, of the manner in which he obtained possession of the goods, ought to be received as part of the *res gestæ*. Should not this be allowed, any man, however respectable, finding a stolen watch in the street, and returning it to the owner, in consequence of an advertisement, might be convicted on the strong presumption arising from the possession.

It appeared, from the subsequent testimony, that Packwood was told by the prisoner, that he obtained the watch from Wilson; and thereupon Packwood, the prisoner and his companion, went to the house of Wilson, for the purpose of apprehending him; but he escaped, as was supposed by the prosecutor, through the connivance of the prisoner. Wilson and the prisoner had been intimate, and about the time the watches were stolen, they were alone together, and put their hands on a bible, and *swore to be true to each other*. From the testimony of Wilson's wife, it appeared that he never had possession of two gold watches to her knowledge.

After the cause was summed up by the respective counsel, the mayor, after recurring to the circumstances of the case, charged the jury, that if they should even believe, that the story told to Packwood, by the prisoner, was untrue, still, there was a question remaining, well worthy of consideration. Whether all the circumstances produced are not as much consistent with the fact, that Wilson first took the property, and the prisoner afterwards came in for his share of the plunder, as that he stole the property, or was co-operating with his companion in the felony. And it is a sound rule, that in a case depending entirely on circumstantial proof, to convict, it must be such as is consistent with guilt only, and is inconsistent with innocence.

The jury acquitted the prisoner.

AT a COURT of SITTINGS, holden in and for the city and county of New-York, at the City-Hall of said city. on the 23d and 24th days of *June*, in the year of our Lord one thousand eight hundred and nineteen.

BEFORE

The Hon. WILLIAM W. VAN NESS,
One of the Justices of the Supreme Court.

M'KESSON, *Clerk.*

(MALICIOUS PROSECUTION.)

WILLIAM WARNER
vs.
MATTHIAS BRUEN.

WILKINS, HOFFMAN, WELLS, and DUNSCOMB, *Counsel for the plaintiff.*
D. B. OGDEN, *Counsel for the defendant.*

To sustain an action for a malicious prosecution, it is unnecessary for the plaintiff to show *actual malice;* but should the jury, from all the facts and circumstances in the case, believe that the prosecution complained of could have resulted only from an intention to harass and oppress the plaintiff, by colour of law, and that the defendant had neither reasonable nor probable cause for such prosecution, *the law supplies malice,* in consequence of his act; and it will be their duty to find him guilty.

This was an action on the case for a malicious prosecution. The declaration, which was filed in the term of August, 1816, contained three counts, the last of which briefly alleged, that after the making of an act of the legislature of the state of New-York, entitled "An act for relief against absent and absconding debtors," passed 21st of March, 1801, the plaintiff was a merchant, residing, trading, and carrying on business in New-York, and held, possessed, and enjoyed certain land and tenements, and goods, chattels, and household furniture; and that the defendant, for himself and Herman Bruen and George Bruen, knowing the premises, but contriving and injuriously intending to harass, oppress and injure the plaintiff, on the 23d of April, 1816, at the place last aforesaid, by colour of that act, maliciously and wrongfully seized and attached, or caused to be seized and attached, the said lands, &c. of the plaintiff as an absent debtor, under and by virtue of a warrant from Richard Riker, Esquire, recorder of the said city; and that on the 12th of August, 1816, he superseded the same, which is now ended and determined; whereas, at the time the said warrant was issued, the plaintiff was a resident of said city and not elsewhere; all which is to his damage of $30,000.

The two previous counts stated the proceedings on the attachment at large, and alleged, that by means of its being issued the plaintiff was deprived of his lands and tenements, goods and chattels, and all his books, vouchers, and securities, &c. was prevented from recovering his debts, and had lost his credit and reputation among his friends and neighbours.

These counts further stated that there was neither reasonable nor probable cause for thus proceeding on the attachment; that it was superseded on the 12th of August, 1816, in pursuance of a rule of the Supreme Court, entered on the 8th of August, and that as respects the plaintiff the proceedings were ended before suit brought.

Wilkins opened the case on behalf of the plaintiff.

The prominent facts in the case appeared to be the following:

On the 3d of November, 1815, the plaintiff, having a family consisting of his wife and several children, and residing in a house in Beaver-street, in this city, was engaged in the business of buying goods, depositing them in his store, and shipping them to markets abroad. He was in great business and in good credit. At that time Randolph & Edgar, through David Dunham & Co., auctioneers, sold the plaintiff goods, belonging to the said Randolph & Edgar and the firm composed of the defendant and his sons, Herman Bruen and George Bruen, amounting to $3752 37 cents, at a credit of four months. In the month of December following the goods were shipped to Charleston, S. C. on the joint account of Solomon Levy and the plaintiff; the latter of whom shortly afterwards, and about the middle of the month, in company with his wife,

embarked on a visit to her friends at Charleston, where he had married her.

At the time the goods were purchased, a promissory note for their amount was executed by the plaintiff in favour of Solomon Levy, and endorsed by him to the firm of which the defendant was one; and on the 6th of March, 1816, when the note fell due, Randolph & Edgar agreed to extend the time of payment to sixty days from that last mentioned; the said Randolph & Edgar having, previous to such renewal, informed Mr. Levy that they should consult Mr. Bruen as to the renewal. Accordingly, a note for $3791 77, including interest, was executed by Levy, and delivered to Randolph & Edgar; and it was understood and agreed that when this note was paid it should be in full of the other.

At the time the plaintiff departed for Charleston, he left his store, and all his books, accounts, and vouchers therein, in charge of Joseph Isaacs, a clerk, who kept the store daily open as usual, until the time the attachment, hereafter mentioned, was served; when he delivered the key to the sheriff, who, in serving the process, was accompanied by the defendant.

The plaintiff had also, before his departure, made an arrangement with James Cummings & Co., merchants in this city, to receive remittances, to be sent to them from Charleston by the plaintiff, and to pay therewith his notes as they fell due, and as he should direct; and he instructed Isaacs to carry notes which might be presented for payment to Cummings for that purpose. The plaintiff accordingly made remittances, at different times, to Cummings & Co. to the amount of $14,000; and when certain notes were presented to the clerk, he carried them to Cummings, by whom they were paid. It did not appear, however, that any directions were left, or afterwards sent by the plaintiff, to pay the note due to the defendant and his partners; the avails of the goods, for which the note was given, having been remitted to Solomon Levy, by his son, who was at Charleston; and never having come into the hands of the plaintiff.

On the 30th March, 1816, the defendant caused the plaintiff to be arrested, and held to bail, at Charleston; and on the 23d of April following, the defendant, for the firm, made application to Richard Riker, then recorder, under the act, entitled, "An act for relief against absconding and absent debtors," passed 21st March, 1801, for an attachment against the plaintiff, *as an absent debtor*.

To support the application, the defendant, pursuant to the statute, presented his own affidavit to the recorder, alleging therein, that the plaintiff was indebted to the persons composing the firm aforesaid, in the sum of $100 and upwards, over and above all discounts, and that he resided out of the state of New-York, and in Charleston, S. C. or elsewhere, out of the said state. The defendant also, according to the act, presented an affidavit to the recorder, made by John A. Woodward and Frederick Shaw, stating, that the plaintiff did reside at Charleston aforesaid, or elsewhere out of the state of New-York.

Whereupon the recorder, in pursuance of the act, issued a warrant of attachment to the sheriff, then Ruggles Hubbard, Esquire, commanding him "to attach and safely keep, all the estate, real and personal, of the said William Warner, in whatever part of the sheriff's county it might be found, with all books of account, vouchers, and papers relating thereto; and that he, with the assistance of two substantial freeholders, forthwith make a true inventory of all such estate, so attached by virtue of the said warrant, and that he return the same, signed by himself and the said freeholders, to the said recorder, at his chambers in the said city, without delay," &c.

The attachment was executed, and, in pursuance of its requisition, the inventory of the goods belonging to the plaintiff was returned by the sheriff to the recorder.

Advertisements, pursuant to the statute, were inserted in the state paper and the National Advocate, reciting the substance of the proceedings aforesaid, and giving notice, that unless the plaintiff returned, and discharged his debts, within one year after such notice, all his estate would be sold for their payment. These advertisements were published until the supersedeas was served.

On the service of the attachment, the goods and books of the plaintiff were seized, his store was shut, and his business suspended. He returned on the 2d of June following.

On his return, the plaintiff made an affidavit, setting forth facts denying the regularity and justice of the attachment, and procured an order from the recorder, for the defendant to show cause against a supersedeas of the same. The defendant appeared before the recorder, and opposed the supersedeas; and the recorder, having power to grant a supersedeas only in the way pointed out by the act, on giving security, he made a return of the proceedings to the supreme court; and on the same affidavit, at the subsequent term, and on the 8th of August, 1816, the court, on due application, granted a rule, setting aside the attachment, with costs. Accordingly, the recorder, in pursuance of the rule granted by the court, issued the supersedeas on the 12th of the same month, and the goods, &c. were redelivered.

On behalf of the defendant, a deposition of Herman Bruen, one of the firm, taken on the 19th of March last, was produced and read. From this deposition, it appeared, that in January and February, 1816, the deponent was in Charleston, S. C. and, in frequent conversations with the plaintiff, and particularly in one on board the ship Elizabeth, he told the deponent, that he, the plaintiff, had purchased that vessel, that he was loading her, and intended very shortly to sail in her to Germany; which fact the deponent shortly afterwards communicated to his father, the defendant. The plaintiff's wife was with him at the time; and the deponent believed that she was about to accompany her husband.

The deponent, while at Charleston, frequently called on the plaintiff for payment of the note, who told him that he did not intend to pay it, but would leave it to Solomon Levy to pay; and that if the holders brought a suit, they would not get a cent, for he had made over his property to his wife. The whole amount of the note, except $848, was and is due.

While the deponent was in Charleston, the plaintiff was frequently in the habit of sacrificing his property at auction, for the purpose of converting it into money, and his commercial credit there was very low.

Being cross-examined, the deponent stated, that in consequence of directions received from his partners in this city, while he was in Charleston, some time in April, 1816, he caused the plaintiff to be arrested and held to bail, in a suit brought by the firm, on the note; but the deponent, at that time, knew nothing of the attachment.

Some testimony, corroborating the facts in this deposition, and much in opposition, was produced, both on the part of the defendant and the plaintiff.

Solomon Levy stopped payment before his note fell due, but not until after the attachment was served; and, in the spring of 1818, the plaintiff took the benefit of the act, before the recorder of this city.

Ogden summed up the case, on behalf of the defendant, and was followed by Hoffman, on the opposite side. He contended to the jury, that although they might not consider there was sufficient evidence of *actual malice*, still the *implication of malice* necessarily flowed from the circumstances of the case.

The counsel, in the course of his argument to the jury, read the case of Chapman vs. Pickersgill, 2d Wilson, 145.

That was an action on the case for falsely and maliciously suing out a commission of bankruptcy against the plaintiff. The declaration alleged, that the defendant did, falsely and maliciously, exhibit a petition to the lord chancellor, that the plaintiff was indebted to him in 200*l*., and had committed an act of bankruptcy; that the commission thereupon issued, and the plaintiff was declared a bankrupt, and that afterwards the commission was superseded; and the plaintiff avers that he never committed an act of bankruptcy.

The defendant pleaded the general issue; and, after a verdict for the plaintiff, a motion in arrest of judgment was made, for this, with other reasons: that the action would not lie, there being a particular remedy given by the bankrupt statutes, (5 Geo. I. and 5 Geo. II.,) which provide, that if it shall appear that the commission was taken out fraudulently,

or maliciously, the chancellor may order satisfaction to the party aggrieved, &c.

The case having been twice argued, in Michaelmas term, 1762, the lord chief justice gave the opinion of the whole court, that judgment must be for the plaintiff.

In the decision, his lordship said, "that the general grounds are, that the commission was *falsely* and *maliciously* sued out; that the plaintiff had been greatly damaged thereby, scandalized upon record, and put to great charges in obtaining a supersedeas to the commission. Here is *falsehood* and *malice* in the defendant, and great wrong and damage done to the plaintiff thereby. Now, wherever there is an injury done to a man's property by a *false* and *malicious* prosecution, it is most reasonable he should have an action to repair himself. See 5 Mod. 407, 8; 10 Mod. 213; 12 Mod. 210. I take these to be two leading cases, and it is dangerous to alter the law. See, also, 12 Mod. 273; 7 Rep. Bulwer's case, 1; 2 Leon. —; 1 Roll. Abr. 101; 1 Ven. 36; 1 Sid. 464. But it is said this action was never brought; and so it was said in *Ashby* and *White*. I wish never to hear this objection again. This action is for a *tort: torts* are infinitely various, not limited or confined; for there is nothing in nature but may be an instrument of mischief, and this of suing out a commission of bankruptcy *falsely* and *maliciously*, is of the most injurious consequence in a trading country."

The judge, in his charge to the jury, stated two questions for their consideration:

1. Whether the defendant had either a reasonable or probable cause for proceeding upon the attachment?

2. Whether there was sufficient evidence against him to warrant an inference of malice?

1. With regard to the first question, his honour adverted to the principal circumstances in the case, preceding and attending the issuing of the attachment. When the plaintiff embarked for Charleston, he left his store in the charge of Mr. Isaacs, the clerk, who kept it open daily, and transacted business. The plaintiff also made arrangements with a respectable mercantile house, in this city, to pay notes which fell due in his absence; and directed the clerk to carry them there, for payment. Remittances, for that purpose, were made by the plaintiff, from time to time, to a great amount, and several of his notes were paid by Cummings & Co., who were understood as transacting business for him in this city. Yet, we do not find that any inquiry concerning the plaintiff, was made of that firm, or any person else, by the defendant.

It appears, that before the credit had expired on the note given by Solomon Levy to the defendants, in lieu of that given by the plaintiff, and endorsed by Levy, and in the latter part of March, 1816, the defendant commenced an action, in Charleston, against the plaintiff, as the drawer of the first note; and on the 23d of April following, instituted the proceedings on the attachment, to secure the same demand.

On this occasion, his honour did not deem it necessary to decide, that the reception of Solomon Levy's note, by Randolph & Edgar, who were interested in the goods for which it was given, operated, in law, to extend the credit on the first note; yet his honour did not hesitate to say, that such was his opinion. And he thought that the jury would be warranted, from the facts, in believing that the credit was extended on that note, with the knowledge and assent of the defendant.

His son had written from Charleston to his father, in this city, informing him, that the plaintiff was about to embark for Europe; but the defendant, in the institution of the proceedings on the attachment, most probably did not act on that letter, but actually waited, after its receipt, about two months. And although, in the progress of this trial, that letter had been referred to, still, it had not been produced. This omission operated as a strong circumstance against the defendant; for the letter may have contained other facts, qualifying the terms in which the information relative to the departure of the plaintiff to Europe, may have been expressed.

2. With regard to the second question proposed, his honour examined the principal circumstances in the case relied on to establish the inference of malice, in

the institution of the proceedings on the attachment.

In support of the application before the recorder, for an attachment, on the 23d of April, the defendant, pursuant to the act, in addition to his own affidavit, obtained those of John A. Woodward and Frederick Shaw, stating, that the plaintiff resided at Charleston, or elsewhere out of this state. The testimony of those men, in support of that fact, would have been of importance to the defendant, on this occasion; but they are not produced, nor is their absence accounted for. The omission, in producing those men as witnesses, forms a strong circumstance against him.

It appeared, that after the return of the plaintiff from Charleston, he applied to the recorder to supersede the attachment. The defendant opposed the application; and the recorder not being authorized under the act, except in the cases therein mentioned, to supersede the attachment, an application was made, at the ensuing term of the Supreme Court, to set aside the proceedings, and the motion was granted. The defendant, therefore, as early as the beginning of the month of June, was apprized of the facts which formed the grounds of that motion: yet we find him opposing the application to the recorder, and continuing the advertisements in the newspapers until the supersedeas was served.

This conduct had been relied on, by the counsel for the plaintiff, as evincive, if not of express malice, at least, as affording evidence that the defendant was not ignorant of the illegality of his proceedings. And, indeed, his honour considered himself bound to say, from an impartial survey of this, with all the other facts and circumstances, that he did not believe that there existed even a probable cause for mistake or ignorance on the part of the defendant, in the institution of this proceeding. Still, as this was a matter of fact, the jury were to decide for themselves.

In cases of this description, it is unnecessary for the plaintiff to prove *actual or express malice*; for, in the most aggravated cases, this would be scarcely, if ever, possible. We must judge of the state of a man's mind, in a given case, by what he has done: and where we find an act, or train of actions, performed, which could have been the offspring of a mischievous or wicked intention only, the law raises the implication of malice, unless it is satisfactorily explained or rebutted. If, for example, a man attacks another in the street, with a weapon calculated to produce death, though no antecedent threats or menaces of vengeance can be proved, *the law raises the presumption of malice* from the act. This principle is applicable to the case under consideration; for although the jury should not be satisfied that there is sufficient evidence of *actual malice*, on the part of the defendant, still, if from all the facts and circumstances in this case, previous and subsequent to the time of the attachment, the jury should believe that his conduct, in the institution of these proceedings, could have resulted only from an intention to harass and oppress the plaintiff, and should they believe that there was no reasonable or probable cause for issuing this attachment, *the presumption of malice* necessarily flows from the act; the law supplies the malice, and the defendant must be responsible for the consequences. Should the jury, however, believe that the defendant took out this attachment innocently, in the usual course of judicial proceedings, without any *malicious* intention, the law would not render him responsible for damages in this action. But, on the other hand, should they be satisfied, that the defendant, under colour of legal process, and for the purpose of gratifying his malignant feelings, has instituted these proceedings, it will be their duty to find him guilty.

The grounds of damages, in this case, are, loss of credit, and injury in business. It had been shown, that the goods, books, vouchers, and other effects of the plaintiff, had been seized and detained for a long time, and his commercial credit and reputation much impaired. There were several mercantile men on the jury, who understood the nature of such business better than his honour, and would be able duly to appreciate the extent of the loss sustained, and the injury suffered, by the plaintiff.

The jury found the defendant guilty, and rendered a verdict in favour of the plaintiff for $5,000.